



# TEXAS CHEMICAL COUNCIL

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January 25, 2010

Ms. Devon Ryan  
MC 205  
Office of Legal Services  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: Rule Project Number 2009-009-101-EN (Failure to Attain Fee)

Dear Ms. Ryan:

The Texas Chemical Council (TCC) appreciates the opportunity to comment on the rule proposed by the Texas Commission on Environmental Quality (TCEQ) to implement Sections 185 and 182(f) of the federal Clean Air Act (CAA).

TCC is a statewide trade association representing approximately 70 chemical manufacturers at over 200 Texas facilities. Our industry has invested more than \$50 billion in physical assets in the state and pays over \$1 billion annually in state and local taxes. TCC's members provide approximately 70,000 direct jobs and over 400,000 indirect jobs to Texans across the state.

The CAA Section 185 requires each state to impose a requirement for the assessment and collection of a fee for major stationary sources of volatile organic compounds (VOCs) and nitrogen oxides (NO<sub>x</sub>) located in a severe or extreme nonattainment area if the area fails to attain the National Ambient Air Quality Standard (NAAQS) for ozone by the applicable attainment date. To assist states in the development of Section 185 fee programs, the U.S. Environmental Protection Agency (EPA) recently issued a guidance document on January 5, 2010 (hereinafter referred to as "Guidance Memo") that raises the question whether it is necessary for TCEQ to implement this proposed rule at this time. Notably, in the memo, EPA states the following:

"EPA believes that for an area that we determine is attaining either the 1-hour or 1997 8-hour ozone NAAQS, based on permanent and enforceable emissions reductions, the area would no longer be obligated to submit a fee program State Implementation Plan (SIP) revision to satisfy the anti-backsliding requirements associated with the transition from the 1-hour standard to the 1997 8-hour standard. In such cases an area's existing SIP should be considered an adequate alternative program." Guidance Memo, p. 3.

EPA issued this guidance document on the same day that it noted in the *Federal Register* that it has not yet made a determination as to whether Houston has attained the 1-hour NAAQS and/or the 1997 8-hour NAAQS. 75 Fed. Reg. 232, FN 1 (Jan. 5, 2010).

Houston air quality has improved dramatically in the last 20 years. Most notably, however, TCEQ's monitoring data show that in the Houston-Galveston-Brazoria (HGB) nonattainment area, the monitors demonstrate attainment with the 1997 8-hour ozone standard on average over the past three years (2007-2009).<sup>1</sup> TCEQ has the data to demonstrate that these remarkable improvements in air quality in the HGB nonattainment area are due to permanent and enforceable reductions in emissions resulting from the Texas SIP and applicable air pollutant control regulations. *See* CAA § 107(d)(3)(E)(iii). Given that the state has a solid case for HGB's attainment with the 1997 8-hour ozone standard, TCEQ should withdraw this rulemaking until EPA makes an official determination as to the area's attainment status.

However, if TCEQ makes the determination to go forward with a rulemaking at this time, TCC encourages the TCEQ to fully utilize the flexibility outlined in the Guidance Memo for Equivalent Alternative Programs. Specifically, the Guidance Memo clarifies that:

“[S]tates could develop programs that shift the fee burden from the specific set of major stationary sources that are otherwise required to pay fees according to section 185, to other non-major sources of emissions, including owners/operators of mobile sources...EPA recognizes that section 185 is not strategic in imposing emissions fees on all major stationary sources, including already well-controlled sources that have few, if any, options for avoiding fees by achieving additional reductions. States can be more strategic by crafting alternative programs that exempt or reduce the fee obligation on well-controlled sources, and assign the required fees to less well-controlled sources as an incentive for those sources to further reduce emissions of ozone-forming pollutants.”  
Guidance Memo, p. 5.

TCEQ currently collects money for the Texas Emissions Reduction Plan (TERP) through annual vehicle registration fees paid to the state. *See* Texas Transportation Code § 501.138. In the event TCEQ goes forward with this rulemaking, TCC encourages TCEQ to explore similar avenues to incorporate owners/operators of mobile sources in the HGB nonattainment area into the Section 185 fee program. In line with TCEQ's proposal, EPA also endorses an emissions-equivalent alternative program, which TCC supports. EPA also endorses a program that combines features of an emissions-equivalent program with a fee-equivalent program.

With regard to the proposal submitted by the TCEQ in the *Texas Register* on December 4, 2009, TCC generally supports the main principles set forth in the proposed rule, as well as the inclusion of Equivalent Alternative Obligations. Specifically, TCC supports the following aspects of the proposal:

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<sup>1</sup> TCEQ website; [http://www.tceq.state.tx.us/cgi-bin/compliance/monops/8hr\\_attainment.pl](http://www.tceq.state.tx.us/cgi-bin/compliance/monops/8hr_attainment.pl); Jan. 7, 2010.

- Allowing a multi-year baseline period consistent with the EPA guidance establishing a high 2-in-10 year baseline as an acceptable method for determining the Section 185 baseline. Furthermore, TCC agrees that businesses, such as those in the petrochemical industry, are influenced by the business cycle and, therefore, have emissions that are irregular, cyclical and otherwise varied qualifying our businesses to use this approach to calculate the baseline amount. TCC requests that this be clarified in the rule or its preamble so that case-by-case reviews of emissions cyclical or variation can be avoided.
- Allowing sources to aggregate NO<sub>x</sub> and VOC emissions in baseline determinations.
- The ability for major stationary sources who are obligated to pay a fee to be eligible to fulfill the fee obligation with an equivalent alternative obligation.

While TCC supports the overall principles within the proposed rule, we request that TCEQ consider making the following changes as outlined below.

- Section 101.100 (6) Baseline Emissions: Emissions from emissions events should not automatically be excluded from the baseline. The owner/operator should be allowed to include emissions from emissions events in the baseline calculation if one can show that total actual emissions of VOC or NO<sub>x</sub> (including emissions events) are less than total allowables for the entire site.
- Section 101.102. New Source Exemption: This rule does not acknowledge the control technology implemented by the industries beyond the rule requirements. For example, an existing major source might add a new unit after the attainment date and should not be penalized since the new emissions unit would have to meet Best Available Control Technology (BACT) in order to get authorization for construction. The current proposed rule is not considering this case.

#### **Proposed Changes:**

Change section 101.100 Definitions to add a definition for emissions unit.

Change section 101.115 Exemptions as follows:

(a) For any major source meeting the applicability requirements of §101.101, any new emission unit that was not in operation on or before the attainment date or those units whose permits have lapsed and were re-permitted as a new unit and thus subject to a new BACT determination in the permitting process are exempt from the requirements of this subchapter.

- Section 101.103. Baseline Amount Calculation: Paragraph (a) should be revised to clearly reflect the options that are available for determining the baseline amount as shown below:

*(a) For purposes of this subchapter, the baseline amount shall be computed as either the lower of (1) or (2), or by using paragraph (3) below:*

*(1) total amount of actual emissions in the attainment year;*

*(2) total emissions allowed under the permit applicable to the source in the attainment year; ~~or~~*

*(3) total emissions as calculated under subsection (b) of this section.*

Additionally, when making the baseline amount determination, TCEQ should consider adding flexibility in the rule for maintenance, startup, and shutdown (MSS) activities which are not yet permitted, were not reported in the attainment year, or are cyclical and occurred outside the selected 24-month period. TCC supports the detailed comments submitted by the Texas Oil & Gas Association on this issue.

- Section 101.104 (c) Aggregated Pollutant Baseline Amount: While TCC appreciates the ability to aggregate emissions for VOC and NO<sub>x</sub> or to aggregate emissions for sites under common ownership, TCC recommends removal of the restriction in section 101.104(c) on using both the site and the pollutant aggregation methodology at the same time. TCC does not believe there is adequate justification for such a restriction and advocates for greater flexibility in complying with the proposed rule.
- Section 101.105(d) Multiple Site Aggregation Baseline Amount: TCC recommends removal of the restriction in section 101.105(d) on using both the site and the pollutant aggregation methodology at the same time. TCC does not believe there is adequate justification for such a restriction and advocates for greater flexibility in complying with the proposed rule.
- Section 101.105 Multiple Site Aggregation Baseline Amount: TCC would like to see a provision added for the appropriate time period to use for all sites in the site aggregation method in the event that one of the sites was not operating during the time period selected for the other site. Even though one site may not have been in operation at that time, TCC recommends using the permit allowable for the non-operating site during the time period pre-operation, in the event it is needed for site aggregation.
- Section 101.117(a) Baseline Amount Determination: TCC supports increasing the time period allowed for submitting the baseline amount emissions report from 90 days to 180

days to allow facilities to conduct the potentially complex analyses involved where emissions fluctuate and the high 24 months-in-10 years evaluation must be performed.

- Section 101.117(c) Compliance Schedule: In paragraph (c) of this section, the fee will be due within 30 days of the invoice date. However, in many cases, the fees will be potentially very large and payment within 30 days may pose an unnecessary hardship for some facilities, especially smaller companies with large payments due. TCC therefore recommends changing the payment date to within 90 days of receiving the invoice.
- Section 101.120(b) Eligibility for Equivalent Alternative Obligation: TCC is concerned that there is not an ability to make a partial payment of a fee obligation using an Equivalent Alternative Obligation. In accordance with the Guidance Memo, companies should have the ability to satisfy the fee obligation by taking full advantage of all available alternatives, without having a limitation to only those that completely fulfill a fee obligation. TCC urges TCEQ to modify the proposed rule in accordance with EPA's guidance.
- Section 101.120(e) Eligibility for Equivalent Alternative Obligation: While TCC appreciates the ability to aggregate emissions for VOC and NO<sub>x</sub>, TCC recommends removal of the restriction in section 101.120(e), relating to restricting sites using this method from using Equivalent Alternative Obligation. This limitation would reduce the potential for actual emission reductions that could occur as a result of Equivalent Alternative Obligations and is contrary to EPA's goal in the Guidance Memo, which is to achieve further reductions to move the HGB nonattainment region expeditiously to attainment.
- Section 101.120(d)(4) Eligibility for Equivalent Alternative Obligation: Clarification is requested on the requirement that *all equivalent obligations must be approved and funded, exercised, or otherwise completed by no later than 60 calendar days from the mail date the notification was sent to the regulated entity*. As it reads, the full completion of a project will be difficult to accomplish in the given 60 day time period.

Finally, TCC recommends that the following comments be incorporated into the final rule:

- In light of EPA's endorsement that states can be more strategic by crafting alternative programs that exempt or reduce the fee obligation on well-controlled sources, TCC requests that TCEQ apply any fee obligations that are eventually adopted in a prospective, and not a retroactive, manner.
- TCC recommends that initial invoices for fee obligations be sent one calendar year after adoption of the rule in order to properly budget. Additionally, in the event of retroactive fee obligations, we recommend the ability to pay out the balance in single year fees with

the option to pay the remaining balance in one lump sum without penalty. This would bring some relief to companies who would be financially strained to pay the entire balance at once.

- Finally, EPA clearly states in the Guidance Memo that states that must still develop and submit a fee program may also include an alternative that provides that the fees end at the time that the area attains either the 1-hour or 1997 8-hour standard due to the existence of permanent and enforceable measures. TCC requests that TCEQ add this provision to the proposed rule.

Thank you again for your consideration of these comments. Please feel free to contact me if you have any questions or need additional information at (512) 646-6404 or [mmcmullen@txchemcouncil.org](mailto:mmcmullen@txchemcouncil.org).

Sincerely,

A handwritten signature in blue ink, appearing to read "M. McMullen".

Mike McMullen  
Director of Regulatory Affairs  
Texas Chemical Council